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Essays in Legal History in Honor of Felix Frankfurter edited by Morris D. Forkosch

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a realistic picture of one continuing distressed area on the international scene. The efforts of the authors should serve as a mild counterweight to transient newspaper clippings, semi-official propaganda, and the general exaggeration of opinionated amateurs. The four contributors neither over-estimate the role, or potential, of international law nor entirely discount it. Within their limited framework they have constructed a small symposium which distills the essentials of a large problem while shedding light upon the field of international law as a whole.

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ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER. Edited by Morris D. Forkosch. Indianapolis: Bobbs-Merrill, 1966. Pp. 667. $17.50.

Not long ago a perceptive critic described our times as "the century of indigestible *Symposia.*"

> It happened just a century ago [he explained] that some forty German classical scholars presented their teacher, Friedrich Ritschl, with the first *Festschrift*, the *Symbola philologorum Bonnensium* (1867). It was soon to be followed by the *Commentationes philologae* with which the sixtieth birthday of Theodor Mommsen was celebrated (1877) by nearly eighty scholars including a dozen Italians, Frenchmen and Englishmen. From the 1880's onwards *Festgaben, Melanges, Miscellanies, Studi,* have been gradually spreading over all branches of learning throughout the western world. Simultaneously, the range of occasions on which they were presented has been multiplying: sixtieth, sixty-fifth, seventieth birthdays, retirement from an editorial office or a professorial chair, and the pious memory of a deceased teacher provide most frequently the inducement for increasing further this flourishing academic retail business.
>
> The time has come to take stock of the situation. . . .

The above outburst, directed at the cataloguing problems that such *Festschriften* volumes visit upon librarians and scholars using the essays buried within them, failed to mention the difficulties they present to reviewers. But such difficulties exist and they are none the less oppressive and foreboding. Confronted by a veritable smorgasbord, the reviewer can scarcely do more than describe the bill of

* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Kentucky Law Journal, the Department of the Navy, or any governmental agency.

fare, comment on one or two particularly tasty (or unsavory) dishes, and gently excuse himself.

The book presently under review is a case in point: its range and scope numb the mind. According to the Table of Contents, the book consists of forty-one essays written by forty-two authors from eleven different countries, plus a Foreword by Mr. Justice Harlan of the Supreme Court. The six hundred pages of text are divided into four parts which, together, promise a certain overall unity.

Part One, entitled *What is Legal History?*, contains a single essay (of the same denomination) by Professor M. D. Forkosch, the editor of the volume. Part Two, entitled *The Use of Legal History*, proposes to "disclose somewhat the contemporary judicial use of legal history." It consists of three subdivisions: the actual uses Justice Frankfurter made of Legal History, as seen through the eyes of six of his quondam clerks; the uses of Legal History in state courts, as described by the Chief Justices of six states (Colorado, Florida, Maine, North Dakota, Ohio, and Wyoming); and the relevance of Legal History to administrative agencies, specifically antitrust law, according to the Chairman of the Federal Trade Commission.

Part Three is entitled simply *Essays in Legal History* and such it is: sixteen essays on the widest range, both in space and time, of topics conceivable. Thus they include (to give only a few samples) essays on *The Taiki Reform and the Sumeramikoso* (a discussion of the way in which a Seventeenth Century Reform Movement transformed the Emperor of Japan from an honorific title into the absolute ruler of a unified nation); *The Golden Bull of Hungary and the Problem of Human Rights* (the Royal Documents issued by King Andrew II in 1222 are compared with the almost simultaneously signed Magna Carta by King John in England); *Was Joan of Arc Really a War Leader?* (in which the "Virgin Warrior" is found to have had no military authority, beyond that of her own personality); and *The Spanish Watercourses of Texas* (in which the current confusion in Texas water law is traced to the post-Civil War lawyers' ignorance of the Spanish law, which provided the historical, and rational, basis of practices and customs still prevalent).

Part Four of the book, entitled *Interrelationship of Legal History and the Social Sciences*, consists of twelve essays by distinguished scholars from fields other than law, among them Professors George Boas, Crane Brinton, and Hans Kohn. These essays purport to demonstrate an "interrelationship" with such social sciences as History, Literature, Labor History, Philosophy and Political Science.

Such, then, is the feast laid before us. The scholarly and pro-

fessional reputations of the contributors, together with the intrinsic interest of the wide variety of topics, must be assurance enough that the book is a treasure trove of a sort. In a sense, that is perhaps all a reviewer need say—if indeed it needed to be said.

Still, this volume is more than a collection of articles. It is a tribute to a widely esteemed legal scholar and judge expressed in a form—*Essays in Legal History*—assumed to be particularly appropriate to the occasion. Hence it seems fair to inquire briefly into the nature of the relationship between Justice Frankfurter and Legal History.

The remainder of this review will briefly consider what Justice Frankfurter owed to (or gained from) his interest in Legal History and, conversely, what Legal History owes to Justice Frankfurter.

Though all the essays in this *Festschrift* are dedicated to Justice Frankfurter, few of them speak of him personally; and of those that do, only one tells us anything significantly new about the relationship between the Justice and Legal History. Most of the essays that do touch on the subject stress his wide learning, and the awe and respect it inspired among those with whom he worked closest, while pointing out a few, specific cases in which he resorted to historical research to throw new light on questions before the Court. But, interesting though this all is, it serves simply to remind us of perhaps the best known single trait of a very famous judge: Felix Frankfurter was a remarkably learned man who frequently drew upon a rich storehouse of knowledge in writing his judicial opinions.

Unfortunately, however, these reiterations, although eloquent and touching, are not very likely to persuade Frankfurter's detractors from a strong conviction that his interest in history contributed mightily to his undoing. To those who never fell under the "Frankfurter spell," (and they were more than a few) he seemed often to use his vast erudition for petty displays of irksome pedantry. Far more gravely, however, his critics believe than an exaggerated fondness for the past, and other such niceties, caused him to forsake the spirit, indeed the very essence, of the philosophy he professed to espouse. In Frankfurter's hands (they will say) the life-giving, icon-smashing expansiveness of Holmes's pragmatism became a strength-sapping, hair-splitting form of scholasticism.

One need not accept such a fanatically censorious view of Justice Frankfurter's work to admit that there is some truth in the charge. There is enough, in fact, to leave all but his most devoted admirers a little uneasy about the unbroken chorus of praise in this volume about his use of legal history. To many uncommitted readers it will appear

very strange indeed that that which is here depicted as a crowning virtue is elsewhere regarded as a besetting sin. Nonetheless, we may fairly say that these essays, which are really too uncritical to help us evaluate the significance of Frankfurter's interest in legal history, serve a very useful purpose: precisely because of their uncritical praise of his use of legal history they sharply raise the questions essential to a fair appraisal of Justice Frankfurter and his work. What exactly was the connection between Frankfurter's fondness for history and his controversial doctrine of "judicial restraint?" Did his interest in the past gradually harness, and finally shackle, the young firebrand who rushed to the defense of Sacco-Vanzetti and later stocked the New Deal with activist lawyers? Again, and more generally, must a love of history necessarily be ultimately destructive of a forward-looking, creative approach to the law?

Considering the last question, it seems, at first glance, that one could posit, as an axiom, that the stronger one's interest in history the greater one's resistance will be to social change. Certainly many of the lawyers and legal scholars identified with "tradition," "custom," and "history" have been forcible defenders of established institutions. Burke and Blackstone (both of whom the militantly anti-historical Bentham attacked so vigorously) immediately come to mind. Likewise, the German "Historical School" of the Nineteenth Century, led by Savigny and Niebuhr, quickly displayed a certain stubborn, not to say reactionary, resistance to social change—an attribute shared with its chief disciples abroad (Sir Henry Maine in England and James Coolidge Carter in this country). By the same token, in the United States, where (notwithstanding Carter, Ames and Woodbine to the contrary) tradition has always been slightly suspect and the Past has never been deeply honored, lawyers and judges have been freer and far more willing to experiment with law and legal institutions than their counterparts in more history-conscious nations. Therefore, the conclusion seems reasonable that one of the most powerful, and dangerous, properties of "history" is its propensity to instill, in its practitioners and devotees, a sense of tradition and continuity of growth that itself militates against change and certainly against radical change.

Further, Frankfurter's own career illustrates the point perfectly: as a lawyer and professor interested in the youngest (and therefore least history-laden) branch of the law—Administrative Law—he was notably concerned not with "preserving" traditions and values but with removing the injustices of his own day. However, as a member of the tradition-ridden Supreme Court, he increasingly indulged his interest

in the Past until, eventually, engulfed in history, he (like Blackstone, Savigny & Co.) became ever more mindful of, if not obsessed with, the need to preserve traditional institutions. This might be, as suggested above, the predictable result of his prolonged exposure to history.

Such is not an untenable hypothesis. But one of the essays in this collection offers a counter-thesis; in the opinion of this reviewer it is worthy of special mention. In *Justice Frankfurter's Historical Sense,* Professor M. R. Konvitz suggests that a love of history need not make one a passive defender of the *status quo,* but might make one brilliantly creative. To prove his point, Konvitz examines the attitudes towards the past of two great poets, Goethe and T. S. Eliot. To Eliot, who found in the past "a sense of the timeless as well as of the temporal," the study of history was necessarily a kinetic, creative search. "Tradition, [he wrote] cannot be inherited, and if you want it you must obtain it by great labor." To show how the search for one's own traditions could lead to a state of mind that positively defied the *status quo,* Professor Konvitz quotes Goethe's indignant denunciation of a proposed toast to "Memory."

> I do not accept memory in your sense. You are merely expressing yourself incorrectly. When we meet something great, beautiful, or important, we should not recall it afterwards from outside ourselves or hunt it out. On the contrary, from the moment of meeting, it should weave itself into our inner self, become one with it, create a new and better self, and so continue to live on within us shaping and forming. There is no past for which we should yearn. There is only the new, which builds itself from the enlarged elements of the past. Genuine yearning should always be productive and should strive for something new and better.

Professor Konvitz asserts that Justice Frankfurter, as a judge, strove to regain his (and our) tradition through history, and this quest forced him (Frankfurter) to bring to the law, and to the Supreme Court, a kind of poetic creativity akin, in quality and spirit, to that of Goethe and Eliot. Therefore, without denying the well-known fact that Frankfurter was Holmes's disciple, (a subject explored in this volume in an essay by President Barnett of Colgate University) Professor Konvitz suggests another well-spring, as it were, from which the Justice's inspiration and legal philosophy flowed. And if this were true, or to the extent that it was true, everyone will agree that Frankfurter does, indeed, owe a great debt to Legal History.

Such an idea is, at least to this reviewer, sufficiently novel to put a familiar subject, Frankfurter, into a new and welcome light. Still, Pro-

fessor Konvitz's thesis, although interesting and valuable, does not refute the proposition that the study of history propagates a warping devotion to established institutions, tradition, and custom. For no one would deny that some of the most history-conscious commentators have been, while defenders *par excellence* of established institutions against change, also brilliantly creative. (Such names as Bolingbroke, de Maistre, and Burke come to mind.) If the prolonged study of the past simply causes such writers to defend the past creatively, then the proposition in question has hardly been contradicted. Thus the question still remains: did Frankfurter's devotion to history cause him (however creatively) to divert the thrust of Legal Pragmatism from a forward-looking concern about present injustices to the backward-tending defense of traditional values?

Perhaps the best refutation of the proposition that history inevitably orients one towards the past is to be found in a comparison of Holmes' and Frankfurter's relationship to Legal History. While comparisons are said to be odious, history (as Maitland said) necessarily involves comparisons. And the comparison of these two jurists in this regard should be instructive.

Holmes was a distinguished legal historian of international reputation. Frankfurter was not. Holmes spent the formative years of his professional life—from the age of twenty to forty—as a legal scholar working in a library with historical sources. Frankfurter spent the equivalent years of his life as a government official dealing with current, practical problems, or as a professor teaching Administrative Law, a new, forward-looking branch of the law. In both cases his contact with historical sources must have been, at most incidental to his *metier*. In other words, Holmes went from the ivory tower (and history) to the Supreme Court; Frankfurter went from the world of politics and current affairs to the same bench.

If a long and close association with history does in fact have the propensity to constrict the outlook and to orient the mind towards the past, it would surely seem that Holmes would have been far more cautious and tradition-oriented than Frankfurter. However, this was not so, and why not?

Possibly, the study of history carries no inevitable propensities with it at all, and such propensities as it does entail are attributable not to history but to the historian. From this premise would follow that those who are Holmeses will be Holmeses whatever they happen to study, and likewise those named Frankfurter, Smith or Jones. But this answer, though to some extent valid, is too easy to be altogether satisfactory. As

an alternative we might consider the possibility that the method, timing, and circumstances under which one turns to history makes the critical difference in one's attitude towards the past.

Once again the Frankfurter-Holmes comparison is suggestive. The most obvious difference between these two jurists in this respect is that, as a judge and legal philosopher, Holmes grew *out* of, while Frankfurter grew *into,* Legal History. And it may be that the mature lawyer who turns to history will have a greater propensity to defer to the past than one who has had a life long familiarity with it.

Thus Holmes, the legal historian, had laboriously worked out his own conclusions about the origins of the common law and the nature of its slow and tortured development that provided the basis of the philosophy of law he expounded so brilliantly as a Judge. That philosophy depended, at bottom, on a sharp distinction between "historical" and "jurisprudential" problems. To Holmes, "historical" problems stemmed from the continued survival of legal prescriptions after the reasons for their being had ceased to exist; "jurisprudential" problems were the manifestations of eternal, essentially unalterable conditions of human life. The former could be solved through pruning and intelligent experimentation, which an indiscriminate devotion to the past could only hamper; the latter admitted of no final solution, though knowledge of history could teach the terrible necessity of protecting men from the selfishness and irrationalities of man. Thus Holmes could see clearly, and distinguish sharply between, situations in which group action should be encouraged from those in which it should be restrained. With the confidence born of a thorough understanding of law and its relation to history, he could confidently urge the chopping away of legal anachronisms (such as the Rule in Shelley's Case), while standing four-square against the atempts by the government, however sovereign, to curtail the right of the outcast Bolshevik to speak freely. Although he decried the "certitude of certainty," much of his own greatness lay in his crisp certainty as to where change in the law was, and was not, permissible. His command of Legal History gave him the knowledge and the philosophy which made his certainty possible.

Frankfurter, by contrast, had no such command of Legal History. Perhaps for that reason, he never managed to distinguish with enough confidence to be convincing between "historical" and "jurisprudential" problems. Thus many persons, and especially Chief Justice Stone, believed that Frankfurter, in the celebrated "Flag Salute" case, treated freedom of speech, one of the basic safeguards against the tyranny of the majority, as a temporal arrangement subject to change from time to time as the legislature deemed necessary. In other words, Frank-

furter confused what Holmes would have called a jurisprudential problem with an historical one—and allowed change where Holmes would presumably have resisted it.

By the same token it may well be that in the reapportionment cases, *Colegrove v. Green* and *Baker v. Carr*, Frankfurter in reality vested certain temporal arrangements, *i.e.*, voting districts, with a sanctity that Holmes, with a greater sensitivity to the "felt necessities" of the times, would have boldly stricken down as a political anachronism. Of course we cannot be sure. And it may be that Frankfurter's dissents will, in the future, come to be valued as solemn warnings from a highly placed official against a pernicious trend. Even so, they do not have an unmistakable ring of truth. Holmes had the capacity for making one feel that he was always talking about *the* crucial issue at *the* critical time. With Frankfurter one is never quite sure.

What I have tried to say is that Frankfurter's natural milieu, as a lawyer or scholar, was not the past and, consequently, his greatest skills were not those of an historian. To the contrary, his training and experience as a lawyer, political administrator, and professor had prepared him to deal with the present, with current problems demanding immediate action. And in truth, few men in this century have been better equipped to deal with such problems. But his successes in these respects did not depend upon a profound understanding of history or a sophisticated use of the past. Indeed, it is arguable that his least satisfactory opinions were those in which he tried to be what he was not, *i.e.*, a legal historian. Moreover, (it is further arguable) that by so doing he made legal history what it is not, and should not be—a substitute for a philosophy of law.

What then was the relationship between Frankfurter and Legal History? It was a marriage of convenience, and like most such marriages, it had its inconveniences.

Whatever use Justice Frankfurter may have made of Legal History, he is now the property, so to speak, of Legal History. Consequently, we might properly ask what Legal History owes to him.

Obviously, every Supreme Court justice is, *ex officio*, an historical figure. Thus Justices Campbell and Shiras as well as Marshall and Story, have their claims to fame—and their biographers. So, certainly, will Justice Frankfurter. But beyond that it is not for us to say what place future legal historians will accord him. We can, however, hazard the guess that they will find him a genuine enigma.

As already indicated, Frankfurter is something of an enigma even to his contemporaries. Some (like the contributors to this *Festschrift*)

virtually idolize him, *while* others (like Professor Fred Rodell of Yale) literally abhor him. Even so, the issue, insofar as there is an issue, of Frankfurter's merit is waged between these two, almost fanatical extremes. But, (and this is the remarkable point) supposedly, to the vast majority of the populace there is no issue at all: Frankfurter *was*, quite simply, the Supreme Court. With the exception of Holmes and one or two others, probably no individual since John Marshall has so completely personified in lay eyes that institution. This remarkably widespread assumption will be the enigma which will puzzle future historians.

Frankfurter will become a genuine historical problem only in a world in which the aura of greatness surrounding his name at Harvard Law Schools has faded into the desiccated, feckless deference now perfunctorily accorded such worthies as Nathan Dane, Simon Greenleaf, and Theophilus Parsons. Such is a world in which the term "New Dealer," like that of "Lollard," "Leveller," and "Philosophical Radical," has become more intelligible to school boys than to the electorate and in which the letters "F.F." have lost their legendary significance and magical effect to the Supreme Court bar, staff, and judges. Then, and only then, will an historian be sufficiently puzzled by the repeated appearance of the name Felix Frankfurter to ask himself seriously why, and how it came to be, that this individual commanded such incredible respect among his contemporaries. To answer the Question, the bewildered scholar will undoubtedly be forced to examine the record, Frankfurter's surviving work.

What the historian will find and what he will conclude cannot be said. However, he will have difficulty accounting for Frankfurter's extraordinary fame by the more conventional criteria for measuring the "greatness" of judges. For example, he will find no clear cut, coherent, logically consistent legal or political philosophy running throughout Frankfurter's writings. Even today difficulty is encountered in summarizing succinctly Frankfurter's legal or political philosophy. Compare the other "great" judges on this point. Legal historians could easily identify the "Common Law" with Lord Coke, "Federalism" with Marshall, and "Pragmatism" with Holmes; given subsequent political and legal developments, scholars could reasonably "find" links between the ideas of these judges and the course of history. Hence the accolade of "greatness" fell upon their shoulders. Frankfurter scarcely ranks with them on this count.

Another conventional criterion of judicial greatness has been legal scholarship. The fame of Justice Blackstone (despite *Scott v. Shephard* and *Perryn v. Blake*) derives from his *Commentaries;* in this country,

Chancellor Kent and Justice Story are remembered largely for the same reason. Likewise, most of our other "great" judges have also been distinguished authors. Justice Holmes's lectures on *The Common Law,* alone, would have assured him a singular place in our legal history. To speak only of the better known jurists of Frankfurter's own generation, Cardoza's *Nature of the Judicial Process* and, to a lesser extent, Brandeis's *Other People's Money* certainly give them an enduring claim to fame, quite independent of their labors on the bench. Again by contrast, one searches Frankfurter's bibliography in vain for a publication, or publications of outstanding, enduring quality. His books and articles scarcely rank with those of the really great scholar-judges.

Still another conventional criterion of judicial greatness is being an outstanding opinion writer. Lord Mansfield, in England, and Marshall, Holmes, and Cardoza in this country, were most conspicuous in this respect; only to a slightly less degree were Lemuel Shaw of Massachusetts and, in modern times, Learned Hand. They graced a bench for many decades and, by the sheer force of their minds, left an unmistakable imprint on the shape and spirit of the law of their day. Their opinions, because of the very names of the authors, seemed to carry greater weight with the bench and bar. Was such the same with Frankfurter? Perhaps.

Undoubtedly, opinion writing was Frankfurter's forte. But, good as he undoubtedly was, the legal historian will, nonetheless, find it awkward to explain Frankfurter's remarkable reputation on this ground when he compares, for example, the powerful, often crisp and distinctive opinions of such lesser acclaimed jurists as Chief Justice Stone and Justice Jackson, to mention only two of his deceased colleagues. Certainly, several of Frankfurter's brethren on the bench seemed to be his equal, or very nearly so, as an opinion writer. Yet none of them rivaled him as a symbol of the Court. Thus, his reputation did not depend, certainly not wholly, upon the sheer excellence of his opinions.

The point of these remarks is *not* to suggest that Frankfurter somehow hoodwinked the public or reaped a harvest of undeserved acclaim. To the historians of the future the reality of the acclaim will not, indeed cannot, be gainsaid. The fact that it cannot be accounted for by conventional criteria will only serve to make Frankfurter all the more interesting to the future; presumably it will force historians to go beyond conventional criteria of judicial greatness in search of the still unperceived ones he did fulfill. Of this we can be certain: when the historians have answered the riddle of Felix Frankfurter—when they can satisfactorily explain how a judge came to *personify,* in so many

eminently discerning eyes, the United States Supreme Court *without* having espoused a distinctive legal or political philosophy, *without* having written formidable treatises on the nature of law, *without* having been an incomparably brilliant opinion writer, they will have understood the mid-Twentieth Century United States better than we do ourselves.

Such, in my opinion, is the most enduring link between Justice Frankfurter and Legal History. Perhaps this gives us a clue to his true greatness. Who but a crown prince of gadflies could leave a conundrum, such a superbly significant conundrum as a legacy?

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FREE PRESS AND FAIR TRIAL. By Donald M. Gillmor. Washington, D. C.: Public Affairs Press, 1966. Pp. 254. $6.00.

For many years the conflict between free press and fair trial has been a fundamental issue in our society. The urgency of the problem has increased greatly in the last few decades due to technological improvements increasing the speed and impact of the communications media. Newspapers, with photographers and reporters working quietly inside the courtroom, can reach a nationwide audience within a few hours of a trial. Television and radio can broadcast the highlights of a trial into homes all over the country. Through these means the entire population of an area can feel intimately involved in courtroom dramas. Thus, the possibilities of both a "quick" and "public" trial are at the same time enhanced and enormously complicated.

Through short, readable, and fairly graphic chapters, Gillmor develops the various aspects of the problem. In dramatic recapitulations of the Sheppard, Oswald, "Mad Dog" Irvin and similar episodes, the author sets the stage and roughly defines the issues to be explored. In a broad sense these are two:

1. To what extent does pre-trial publicity prejudice the entire population making it impossible to draw an impartial jury?
2. To what extent does trial publicity filter back to members of the jury and so corrupt the verdict?

Justice often can be subverted by men on all sides who are simply